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A LEGISLATIVE CURB ON THE JUDICIARY

It is generally said that American courts, both state and federal, have a power which the courts of no other country possess, namely, the power to decide upon the constitutionality of legislative enactments. So broad a statement is perhaps erroneous, since the courts of the German Empire also have the power to declare a law of any member-state of the empire unconstitutional because it is either *formell* (in form, or in the method of its enactment) or *sachlich* (in substance, or on account of its content) contrary to the imperial constitution; some German state courts and writers also assert that these courts have the power to declare unconstitutional the enactments of their co-ordinate legislative bodies. But the result of this activity on the part of the German courts would be entirely different from the result in the case of our courts, first, because the German constitutions contain no such general clauses as do our constitutions which enable the courts to substitute their theories of social economy and public policy for those of the legislative bodies—and they have done this in the United States in spite of what the courts may say in their defense —and secondly, because the German constitutions are amendable by the same process and by the same bodies which pass the laws. What is unique in our system is the effect of the exercise of this function by the courts in inhibiting certain legislation for a long time or practically forever because of the comparative difficulty of amending our constitutions, especially the federal Constitution. A

power of the courts which has such an effect is, therefore, of tremendous importance, especially in a popular government in which it can be used as a censorship to set at naught the will of the people as expressed by their representatives. It is claimed by many that some of our courts have abused the power in this way.

It is not strange, therefore, that there has been much discussion of this power during recent years. Researches have been made to determine whether the founders of the constitution really intended that the courts should have it.[1] There seems little doubt that the founders intended the courts to have it,[2] although there is as little doubt that they could not foresee the extent of its use—and perhaps its abuse. But whether the power is a judicial usurpation or not, it is certain that the courts will not give it up unless legal and constitutional means exist to take it from them.

The opposition to this so-called judicial veto power has been associated with the general spirit of dissatisfaction with the courts which is partly incident to the period of social and economic unrest through which we are passing and partly due to the formalism and doctrinarianism into which our law has fallen and to its inability to adjust itself to business and life. Together these causes of discontent have led to the putting-forth of a number of reforms. Chief among those which were the subject of the greatest popular discussion were the recall of judges and the recall of judicial decisions. Professor Pound[3] has even proposed the recall of the law teacher. However, all of these proposals are such radical departures and seem to be fraught with so many disadvantages that they are not likely to find very ready acceptance.

Conservative persons have pointed out that by providing a power of amendment the constitutions themselves all offer a way of overruling the courts when they block the path of legislation which the popular will demands. But to many[4] this method seems too

[1] Dougherty, *Power of Federal Judiciary over Legislation;* Beard, *Political Science Quarterly*, XXVII, 1 f.

[2] Beard, *op. cit.*

[3] "Social Problems and the Courts," *American Journal of Sociology*, XVIII, No. 3, p. 331.

[4] Frederick Bruce Johnstone, "An Eighteenth Century Constitution," *Ill. Law Rev.*, VII, No. 5, pp. 280 f.

slow and cumbersome. In its favor, however, it may be said that the state courts have been the chief offenders in declaring unconstitutional laws which embodied certain very desirable and necessary economic and social reforms, and that the state constitutions are comparatively easy to amend. In some cases this power of amendment has been used in advance when there was any doubt of the constitutionality of the desired legislation, as for instance in Wisconsin in the case of the income tax law.[1] If this is done the delay and work is not so great as when the law is passed first and when, after a court's adverse decision, the constitution must be amended and the law passed again.[2] The latter course, considering the changes of sentiment incident to popular government and the biennial elections of our legislatures, is a considerable hardship for the earnest reformer.

But our state courts also have the power to adjudge legislation unconstitutional because it violates the Constitution of the United States; and when they so decide, there is no appeal to the United States Supreme Court, for an appeal is given only when the decision is in favor of the constitutionality of the state legislative enactment.[3] It is this state of the law which creates our present situation in which certain things are constitutional in some states and unconstitutional in others on account of the United States Constitution. Thus a workmen's compensation law is constitutional in Wisconsin[4] and Washington[5] and unconstitutional in New York,[6] although, it is true, the New York court based its decision on the New York constitution. It has been said repeatedly that the Ives case in New York which aroused such a storm of criticism would very likely have been overruled if it could have reached the

[1] Laws of Wisconsin, 1911, chap. 658; Laws of Wis., 1907, chap. 661; and Laws of Wis., 1909, p. 857.

[2] If one would see how freely this power of amendment is being used in some states, one has only to look at the constitutional amendments in the Wisconsin Session Laws for 1909 or 1911 to see the number pending at one time. In Indiana this would be impossible because by the peculiar provision of its constitution only one constitutional amendment may be pending at one time.

[3] United States Revised Statutes, Sec. 709.

[4] *Borgnis et al.* v. *Falk Co.*, 147 Wis. 327.

[5] *State ex rel.* v. *Clausen*, 117 Pacific 1191.

[6] *Ives* v. *S.B. Ry. Co.*, 201 N.Y. 271.

United States Supreme Court and had depended on the federal Constitution only. There are many instances of a similar nature.[1]

But, as a change in this matter has already been thoroughly agitated and has even been embodied in at least one of the late political platforms, and as this is merely a matter of a change in a statute which Congress has full power to make, perhaps we may hope soon to see the law fixing the jurisdiction of the federal courts so changed as to make the United States Supreme Court the final arbiter in all cases involving the federal Constitution, including cases arising under state statutes.

In cases arising under federal statutes one can always get into a federal court under the present law whether the cases originate in a state or federal court. Then, if the state questions in a state law were provided for by constitutional amendments, the question of the constitutionality of the law must ultimately be decided by the United States Supreme Court, even though that tribunal will not decide cases unless the decision of a federal question is necessary to decide them,[2] because the sole question then would be the question of their constitutionality under the United States Constitution. This would leave the federal courts, and more especially the United States Supreme Court, to be dealt with. As has been said above, the United States Supreme Court has been less open to criticism than the state courts, as regards abuse of the power to declare laws unconstitutional.

The warmest conflicts between the courts and the people or the legislatures have arisen in regard to the general clauses in the constitutions, especially the due process and equal protection clauses. It is these undefinable clauses which form the only restriction on the police power, the greatest of all governmental powers, and it is under this power that almost all of the social and economic reforms which are being proposed and which have been enacted in other countries must be sustained if they are to be sustained. Many persons believe and many courts have held that these clauses were meant to embody in the constitutions and to establish as

[1] W. F. Dodd, *Illinois Law Review*, VI, No. 5 (December, 1911), p. 289.

[2] *De Sausure* v. *Gaillard*, 127 U.S. 216, 32 L. Ed. 125; *Johnson* v. *Risk*, 137 U.S. 300, 34 L. Ed. 683.

permanent norms of state action the economic, social, political, and legal-philosophical theories of the great thinkers who held in their spell the founders and all students of their time—that is the social-compact theory of the state, the individualist, *laissez-faire* theory of economics, the tripartite division of government with its checks and balances, and the other doctrines taught by Rousseau, Montesquieu, and the Smith school of economists. Such clauses would have no place in any scientifically framed constitution because social and economic theories are ever changing as social and economic life and conditions change, and the law must change with them if it would even approximate justice. But, since these clauses are in our constitutions for good or ill, the courts must supply the element of flexibility and suitability to changed conditions by their interpretations of them. Some of the state courts have nevertheless clung more or less tenaciously to the idea that these clauses must be held to make the natural rights theory and the doctrine of non-interference of government, with their corollaries of freedom of contract and inviolability of individual rights, part of our constitutions, and have nullified legislation the desirability and wisdom of which was not questioned even by themselves. The United States Supreme Court has usually taken the position that the meaning of these general clauses changes with the times.[1] But it has not always done so,[2] especially when it was sought to justify a legislative exercise of the police power on the ground, not of protection to health or morals, but of economic necessity. When the Supreme Court takes its stand against reform legislation it is, for all practical purposes, an insurmountable barrier, because the United States Constitution is so difficult to amend that this power of amendment can be brought into play effectively only in times of a great national crisis like the Civil War. The income tax affords a good illustration. The constitutional amendment which seeks to remove the obstacle of the decision of the United States Supreme

[1] *Hurtado* v. *California*, 110 U.S. 516, 28 L. Ed. 232; *Tullis* v. *Lake Erie Co.*, 175 U.S. 348, 44 L. Ed. 192; *El Paso Ry. Co.* v. *Guiterez*, 215 U.S. 87, 54 L. Ed. 106; *Holden* v. *Hardy*, 169 U.S. 366, 42 L. Ed. 780; *Noble State Bank* v. *Haskell*, 219 U.S. 104, 55 L. Ed. 112.

[2] *Lochner* v. *N.Y.*, 198 U.S. 45, 49 L. Ed. 937; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 39 L. Ed. 1108; *Adair* v. *U.S.*, 208 U.S. 161, 52 L. Ed. 436.

Court holding such a tax unconstitutional[1] has but just received the approval of the necessary number of states, although the adverse decision on the earlier law was rendered in 1895. What might be the fate of urgently needed reform legislation if we were to depend upon the power of amending the United States Constitution may be surmised from this.

It is also suggested that great moral dissuasion and even coercion may be exercised by the legislative bodies to deter the courts from declaring laws unconstitutional through the power which they have in many cases of abolishing the courts. In this respect, the federal courts are in a much weaker position than the state courts because only one of them, the United States Supreme Court, is a constitutional court. All of the lower federal courts could be abolished by Congress, and the jurisdiction of even the Supreme Court could be taken away, with the exception of its comparatively unimportant original jurisdiction. Its membership might also be reduced by failure to appoint on the part of the president and Senate or by act of Congress.[2] But again, these methods would be so disastrous in their consequences that they are not to be considered.

For these reasons many are looking for some easier method of curbing the United States Supreme Court and also the state courts when they prove serious obstacles to reform legislation. Some believe the solution is to be found in the legislative power of Congress to fix the appellate jurisdiction of the United States Supreme Court and the entire jurisdiction of the lower federal courts, and in the power of many state legislatures to fix or at least to limit the jurisdiction of their highest courts. That is, Congress, or a state legislature in a similar case, can simply pass a law taking away the jurisdiction or power of the courts to adjudge a law unconstitutional. This could be done either by a general law taking away all power to decide constitutionally, or in special cases. One such special case has already been proposed to Congress. Congressman Berger of Wisconsin has appended to the old-age pension bill which he introduced into Congress a provision that no

[1] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 39 L. Ed. 759 and 1108.

[2] Goodnow, *Social Reform and the Constitution*, pp. 344 f.

court shall adjudge said act unconstitutional and that the jurisdiction to do so is by said act taken away from the courts. The language of the provision is as follows:

> That in accordance with section *a*, Article 3, of the Constitution, and the precedent established by the act of Congress passed over the president's veto March 27, 1868, the exercise of jurisdiction by any of the federal courts upon the validity of this act is hereby expressly forbidden.

Is such a provision valid and will it have the desired effect?

The argument in its favor has an appearance of persuasiveness. Since Congress confers jurisdiction it can also take it away, and it may take away part of the jurisdiction as it sees fit. Congress may even take away jurisdiction over a particular subject-matter or a particular statute after the court has entered upon the consideration of the case. It did this very thing in the noteworthy case of *Ex parte McArdle*,[1] which is the authority upon which those who maintain that Congress has the power to prevent the courts from deciding the constitutionality of laws base their argument, although there are many other less striking cases sustaining this power.[2] In the McArdle case certain of the drastic reconstruction acts came up for consideration, and Congress, fearing that the Supreme Court would hold them unconstitutional, passed a law taking away the appellate jurisdiction over this subject. The Court promptly submitted, dismissed the appeal, and answered the objection that Congress had taken the action only to prevent the acts being held unconstitutional by saying: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given in express words."

This case, it will be noticed, relates only to the appellate jurisdiction of the Supreme Court; but there is no doubt that Congress has the same power over the jurisdiction of the other federal courts.[3] Of course a similar statement would be true of a state legislature which had a like power over the state courts. If it follows from

[1] 7 Wall. 506, 19 L. Ed. 264.

[2] *Barry* v. *Mercein*, 5 How. 103, 12 L. Ed. 70; *In re Vidal*, 179 U.S. 126, 45 L. Ed. 118; *The Habana*, 175 U.S. 677, 44 L. Ed. 320; *Ribas y Hijo* v. *U.S.*, 194 U.S. 315, 48 L. Ed. 994.

[3] Constitution, Art. III, sec. 1; *Gaines* v. *Fuentes*, 92 U.S. 10, 23 L. Ed. 524.

this case that any part of the jurisdiction of the courts which the legislative power wishes to take away may be taken away, it follows that we have no further problem of meeting constitutional limitations; in fact, it follows that our constitutions are no more of a restriction on our legislative bodies than is the unwritten constitution of England on Parliament, for all the legislative body need do is to add to every law a provision that the courts may not adjudge it unconstitutional and that the jurisdiction to do so is taken away. The law then becomes constitutional because no power exists to dispute it.

If this power exists in our legislative bodies, it is indeed not easy to explain "why these important and far-reaching precedents, now brought into the limelight by Mr. Berger, have been ignored by Congress and the country for more than forty years. . . . . Neither is it easy to explain why, now that he has resurrected them, they are still given little or no attention by the press of the country."[1] If the provision is valid and effective, it means nothing less than an entire change in our form of government.

Goodnow leaves the question of its validity undecided.[2] But, it is believed, the nature of the power which our courts exercise in declaring laws unconstitutional has been misconceived. This is not in the nature of a veto power or a supervisory power over legislation; it is purely a part of the power which the courts have to find, declare, and apply the law.

Our law consists of the common or unwritten law and of the constitutionally valid statutory enactments of our legislative bodies. An act of the legislature which is either not within its power or is expressly prohibited by the constitution is not law at all.[3] This rule has always been followed with strict logical consistency[4] and often

[1] W. H. M. in *The Public*, Chicago. [2] *Op. cit.*, p. 348.

[3] Willoughby on the *Constitution*, pp. 9 f.; Hall, *Constitutional Law*, p. 46.

[4] The exceptions to this doctrine noted by Willoughby (*op. cit.*, p. 10) may be doubted. The cases following *Gelpke* v. *Dubuque* are based on an inappropriate application of the clause of the Constitution concerning the impairment of contracts and the rule as to the law applied by the federal courts in cases in which jurisdiction is gained only on account of citizenship of the parties. It is an anomalous doctrine and in effect may amount to giving temporary legal effect to an unconstitutional enactment but the courts have never consciously given it this effect (Willoughby, *ibid.*, p. 922).

The courts have also tried to reconcile the doctrine of *de facto* officers (which

with very harsh results. Thus if a statute is not tested before the courts for a long time after its enactment and it is then found unconstitutional, all transactions which took place in reliance upon it are null and void.[1] The theory is that the statute never was a law. The court does not make the law void, the court simply publishes a fact which existed from the time of the passage of the law, or, in other words, the court simply refuses to apply a law which is no law or to allow someone to use its machinery to assert rights which do not exist because they are based on the mere phantom of a law. Following this theory, the courts hold that when a decision adjudging a statute unconstitutional is overruled by a later decision holding the statute valid, it is valid from its passage and all transactions ever had under the act are valid.[2]

And the rule is strictly extended even to public officers who are always held to take the risk of action or non-action under an unconstitutional statute. If they act and the statute is later found by the courts to be unconstitutional, they acted without the sanction of law and are liable in damages to anyone injured;[3] if they refuse to act because they believe the statute under which they are asked to act to be unconstitutional and it is later found to be constitutional, they are likewise liable because they have disobeyed the express command of the law.[4] This is the theory carried to its logical ultimate even at the expense of concrete justice.

Willoughby mentions as a further exception) with their doctrine of the effect of unconstitutional acts, by holding that there must be a constitutionally valid office in existence in order that the acts done in the exercise of it may be considered those of a *de facto* officer, and that if the act creating the office is unconstitutional there can be no *de facto* officer (Mechem, *Public Officers*, pp. 217 f.).

[1] *Civil Rights Cases*, 109 U.S. 3; *U.S.* v. *Cruikshank*, 92 U.S. 542; *U.S.* v. *Harris*, 106 U.S. 629; *Ableman* v. *Booth*, 21 How. 506; *Norton* v. *Shelby County*, 118 U.S. 425, 30 L. Ed. 178; see *Rutten* v. *Patterson*, 73 N.J.L. 467, 64 Atl. 573; *Woolsey* v. *Dodge*, 2 McLean 142; *Roberts* v. *Hackney*, 109 Ky. 265, 59 S.W. 328.

[2] *Pierce* v. *Pierce*, 46 Ind. 86; *McCollum* v. *McConaughy*, Ia. 119 N.W. 539; *Whaley* v. *Gaillard*, 21 S.C. 560.

[3] *Fisher* v. *McJirr*, 1 Gray 1; *Osborn* v. *Bank*, 9 Wheat. 738; *Norton* v. *Shelby County*, 118 U.S. 442; *U.S.* v. *Lee*, 106 U.S. 196; *Cunningham* v. *Macon R.R. Co.*, 109 U.S. 446; *Poindexter* v. *Greenhow*, 114 U.S. 270; *Sumner* v. *Beeler*, 50 Ind. 341; *Lima* v. *Polk*, 8 Lea 121; *Board* v. *McComb*, 92 U.S. 531.

[4] *Clark* v. *Miller*, 54 N.Y. 528.

The theory is based upon the idea that this power of the courts is a strictly judicial one not at all like the veto power of the president or our state executives. The latter is a strictly legislative power although exercised by an executive officer, this being one of the pet checks and balances which were to keep our delicate governmental machine running smoothly.

As a logical corollary of the doctrine that the power of the courts is a strictly judicial power, a rule was established that it is to be exercised only when it is absolutely necessary in the course of actual litigation. The courts generally refuse to decide moot cases or fictitious controversies to settle the questioned constitutionality of an act passed by a legislative body, although it must be said that this rule has been quite flagrantly violated by some courts.[1]

It is likewise because of this rule that the power of the courts over legislation is a strictly judicial power, exercisable only in the usual channel of judicial power, that is, in the trial of cases, that the courts have refused to give advisory opinions to the legislature as to the constitutionality of proposed legislation,[2] and that in states where provision is made for such opinions by the constitution the courts have considered this a mere administrative function the exercise of which did not bind them when they came to exercise their judicial function of deciding upon the constitutionality of legislation after its passage.[3]

For the same reason the courts have refused to decide political questions, such as questions of neutrality, sovereignty over territory,

[1] See the article by the writer in *Journal of Political Economy*, XX (February, 1912), pp. 180–81.

[2] Hall, *Constitutional Law*, p. 48.

[3] Willoughby, *op. cit.*, p. 13, n.; *In re Senate Resolution on Subject of Irrigation*, 9 Colo. 620, 21 Pac. 470; *In re Senate Resolution Relating to Senate Bill No. 65*, 12 Colo. 466, 21 Pac. 478; *In re University Fund*, 18 Colo. 398, 33 Pac. 415; *In re Priority of Legislative Appropriations*, 19 Colo. 58, 34 Pac. 277; *In re Penitentiary Com'rs*, 19 Colo. 409, 35 Pac. 915; *In re Fire, Police and Excise Com'rs of City of Denver*, 21 Colo. 14, 39 Pac. 329; *In re Reply of the Judges*, 33 Conn. 586; *In re Executive Communication Concerning Powers of Legislature*, 23 Fla. 297, 6 South. 925; *In re Answer of the Justices to the House of Representatives*, 122 Mass. 600; *In re Application of Senate*, 10 Minn. 78 (Gil. 56); *Rice* v. *Austin*, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330; *In re North Missouri R.R.*, 51 Mo. 586; *In re Opinion of the Court*, 55 Mo. 497; *In re Opinion of the Court*, 62 N.H. 704; *In re School-Law Manual*, 63 N.H. 574, 4 Atl. 878; *State* v. *Baughman*, 38 Ohio St. 455; *In re Chapter 6, Session Laws of 1890*, 66 N.W. 310.

or diplomatic questions, even though the constitutionality of legislation was involved.[1] Political questions should be decided by the political agencies of the government; the business of the judiciary is merely to decide controversies between man and man, and in the course of such controversies only can they decide upon the constitutionality of legislative acts.

It is apparent, then, that to take away the power of the courts to decide constitutionality means a limitation of their judicial power, and not a mere deprivation of jurisdiction—and that there is a distinction between the two[2] becoming more evident as we are trying to meet some of the latter-day problems. Legislative bodies may create courts and may destroy courts, but they cannot stop half-way and create as courts nondescript bodies which, because they lack some of the essentials of judicial power, are not courts. So the legislature may give or take away jurisdiction, but if it gives jurisdiction of a certain subject-matter, for instance, old-age pensions, employers' liability, or the like, it cannot deny sufficient judicial power to the courts so that they can give due process of law to parties before them, properly protect the rights of parties, and give force to judgments. One of the essentials of judicial power under the American system of judicial administration is the right to refuse to administer unconstitutional laws. There is little doubt but that the courts will refuse to give it up.

Another essential element of judicial power is the right which all courts have to maintain their dignity and enforce respect for their orders by punishing for contempt of court, and it has always been held that the legislature may not take this power away from the courts.[3] This, too, is an inalienable attribute of a court and

[1] Willoughby, *op. cit.*, pp. 999–1011; *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25; *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 10 L. Ed. 226; *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 12 L. Ed. 581; *Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50, 18 L. Ed. 721; *Botiller* v. *Dominguez*, 130 U.S. 238, 9 Sup. Ct. 525, 32 L. Ed. 926; *U.S.* v. *Texas*, 143 U.S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285; *Benson* v. *U.S.*, 146 U.S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991; *Worman* v. *Hagan*, 78 Md. 152, 27 Atl. 616, 21 L.R.A. 716; *Hanley* v. *Wetmore*, 15 R.I. 386, 6 Atl. 777; *State* v. *Thorson*, 9 S.D. 149, 68 N.W. 202.

[2] Willoughby, *op. cit.*, pp. 1268 f.

[3] *State* v. *Morrill*, 16 Ark. 384; *Little* v. *State*, 90 Ind. 338; *In re Wooley*, 74 Ky. 95; *Langdon* v. *Wayne Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *In re Chadwick*,

bears a strong analogy to the power of declaring laws unconstitutional. As it happens, this question also is in the public eye now because of the Clayton bill pending before Congress to curb the power of the courts in this respect. In this matter, as in the matter of the practice and the rules of evidence, the legislature may modify and reasonably restrict[1] but it cannot absolutely prescribe to the courts. So it cannot declare what shall be conclusive evidence of a certain fact,[2] though it may make prima facie rules of evidence. Likewise, it may not absolutely control admission to practice law[3] because lawyers are court officers and courts always have the power to decide the qualifications of their own officers. Some courts have carried this to extreme in holding that the legislature cannot even decide who is a proper janitor for the court[4] or what is a proper place to hold the court.[5] It is also held that the legislature may not force the courts to write opinions.[6]

And on the more immediate question under discussion here authority is also not wanting. Thus it has been held that the legislature may not control the construction to be put upon a statute.[7] That is, if the legislature gives the courts jurisdiction

109 Mich. 588, 67 N.W. 1071; *Zimmerman* v. *Zimmerman*, 7 Mont. 114, 14 Pac. 665; *Hawes* v. *State*, 46 Neb. 149, 64 N.W. 699; *State* v. *Myers* (*Com. Pl.*), 19 Wkly. Law Bul. 302; *Hale* v. *State*, 55 Ohio St. 210, 45 N.E. 199; *Burke* v. *Territory*, 2 Okl. 499, 37 Pac. 829; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78; *Wyatt* v. *People*, 17 Colo. 252, 28 Pac. 961.

[1] Black, *Constitutional Law*, p. 90, note 30.

[2] *People* v. *Rose*, 207 Ill. 352, 69 N.E. 762; Black, *op. cit.*, p. 90, notes 28 and 29; *Johnson* v. *Gehbauer*, 64 N.E. 855, 159 Ind. 271; *Parkison* v. *Thompson*, 73 N.E. 109, 164 Ind. 609; *Detroit Nat. Bank* v. *Blodgett*, 73 N.W. 120, 115 Mich. 160, 73 N.W. 885, 115 Mich. 160; *Brown* v. *Kalamazoo Circuit Judge*, 42 N.W. 827, 75 Mich. 274, 5 L.R.A. 226, 13 Am. St. Rep. 438; *Jordan* v. *Andrus*, 26 Mont. 37, 66 Pac. 502.

[3] *Ex parte Secombe*, 60 U.S. (19 How.) 9, 15 L. Ed. 565; *In re Splane*, 123 Pa. St. 527, 16 Atl. 481; *In re Day*, 181 Ill. 73, 54 N.E. 646, 50 L.R.A. 519.

[4] *State* v. *Smith*, 15 Mo. App. 412. [5] *In re Courtroom*, 148 Wis. 109.

[6] *In re Griffiths*, 118 Ind. 83, 20 N.E. 513; *In re Headnotes*, 43 Mich. 641, 8 N.W. 552.

[7] *Files* v. *Fuller*, 44 Ark. 273; *Cotton* v. *Brien*, 6 Rob. 115; *City of New Orleans* v. *Louisiana Mut. Ins. Co.*, 26 La. Ann. 499; *Gough* v. *Pratt*, 9 Md. 529; *Planter's Bank* v. *Black*, 19 Miss. 43; *Householder* v. *City of Kansas*, 83 Mo. 488; *Lincoln Building Ass'n* v. *Graham*, 7 Neb. 173; *Salters* v. *Tobias*, 3 Paige 338; *Reiser* v. *William Tell Sav. Fund Ass'n*, 39 Pa. St. 137; *Haley* v. *City of Philadelphia*, 68 Pa. St. 45, 8 Am. Rep. 153; *Meyer* v. *Berlandi*, 39 Minn. 438, 40 N.W. 513, 12 Am. St. Rep. 663, 1 L.R.A. 777; *State* v. *McGrath*, 95 Mo. 193, 8 S.W. 425; *Titusville Iron Works* v. *Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917; *People* v. *Kipley*, 49 N.E. 229, 171 Ill. 44, 41 L.R.A. 775.

over the statute, it cannot control the exact method of its exercise because that is an infringement upon the judicial power. Likewise, the exact question propounded above, namely, whether or not a provision taking from the courts the power to decide upon the constitutionality of laws is valid, has been answered in the negative by state courts.[1] Legislatures, it is held, cannot decide constitutionality; that is a function of the courts. There is little question but that the United States Supreme Court would hold the same.

Two positions would be open to the courts in relation to a provision like the one in Mr. Berger's bill. One is simply to hold it invalid and decide the constitutionality of the statute notwithstanding the provision—and this is the more likely position. The other is to refuse to have anything to do with the administration of the act because Congress by taking away one of the essentials of judicial power had really taken away the jurisdiction of the court over the subject. In neither case does the provision have its desired effect.

Such a provision would violate both the Fourteenth Amendment of the United States Constitution, which provides that life, liberty, or property may not be taken without due process of law, and the tripartite division of governmental powers which is provided by our national and state constitutions. Due process of law means the effective exercise of jurisdiction with unimpaired judicial power, and the doctrine of the separation of powers forbids any encroachment by the legislature on the functions of the judiciary.

Whether or not the power is usurped—as exclamatory publicists are wont to assert[2]—American courts have the power to pass upon the constitutionality of legislation and will keep it until it is constitutionally taken away. There is no such short-cut way of constitutional amendment as that proposed.

But this is not to say that the case of *Ex parte McArdle* is not law today, nor has the Supreme Court wilfully nor have lawyers carelessly forgotten its existence. The case has been entirely

[1] *Field* v. *People*, 3 Ill. (2 Scam.) 79; *Householder* v. *City of Kansas*, 83 Mo. 488; *Ex parte Blanchard*, 9 Nev. 101; *In re Ruan*, 132 Pa. St. 257, 19 Atl. 219, 7 L.R.A. 193; *In re County Seat*, 2 Chand. 212; *State* v. *Spears* (Tenn.), 53 S.W. 247.

[2] Allan A. Benson, "The Usurped Power of the United States Supreme Court," *Pearson's Magazine*, September, October, November, December, 1911.

misunderstood by those who assert this. Appellate jurisdiction may be taken away today as ever from the Supreme Court by Congress. If there is any reason why Congress does not wish the Supreme Court to pass upon any law, as for instance the old-age pension law, it can effect this by a provision to that end. That is just what was done in the McArdle case. However, this will simply give the final determination of the matter, including the question of constitutionality, to the lower federal courts, and experience has shown that reform measures fare worse there than in the Supreme Court. Of course, Congress can also take away the jurisdiction of the lower federal courts over a particular subject or statute. Then, unless it gives jurisdiction to the state courts—and there the same problem arises because they also enforce the limitations of the United States Constitution—no court will have power to enforce the particular law and it will die from lack of exercise. Withholding jurisdiction will not accomplish the desired result because courts are needed to enforce the law and giving jurisdiction gives all the essentials of judicial power including the determination of constitutionality. In the one case it would be throwing the baby out with the bath, as the Germans say. In the other case one cannot have one's cake and eat it too.

Another novelty in legislation on this subject is contained in the Bourne bill now before Congress, which provides that laws may not be declared unconstitutional except by unanimous decisions. The validity of this measure is also doubtful.[1] The provision would not take away any essential of judicial power but seemingly would merely control the manner of its exercise. On this ground it could be sustained on the analogy of the many laws affecting the practice of the courts.

In the case of state judges it might also be possible to make them subject to removal by the legislature for declaring laws unconstitutional. But even if this scheme were to prove valid, it could not, because of the practical unamendability of the United States Constitution, be used against the federal judiciary where there would probably be the most need of it. All federal judges are

[1] Goodnow, *op. cit.*, pp. 352 f.

by the Constitution guaranteed a tenure for life or during good behavior.[1]

There are no legislative restrictions on the judiciary which will really accomplish the result of stopping courts from declaring laws unconstitutional, and there are very few which even slightly restrict or deter the courts of which the validity is not very questionable. The only safe method of assuring constitutionality is by constitutional amendment, and it is best not to waste time and to disappoint hopes by schemes like those herein discussed when in the meantime an amendment to the United States Constitution amending the amending clause[2] so as to make it similar to the state constitution could be well on its way. In the meantime, while the work must be done by judicial interpretation of the Constitution whether for good or for ill, much can be done by proper changes in our system of legal education. Instead of making such very efficient technicians and case-triers, we could well devote some attention to the subjects to which the Germans devote a good part of the law course—the philosophy of law, its history and development, and its basis in the social sciences.

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[1] Constitution of the U.S., Art. III, sec. 1

[2] Frederick Bruce Johnstone, *op. cit.*, pp. 280.